

# STATE OF COLORADO

## Colorado General Assembly

Mike Mauer, Director  
Legislative Council Staff

**Colorado Legislative Council**  
200 East Colfax Avenue Suite 029  
Denver, Colorado 80203-1716  
Telephone 303-866-3521  
Facsimile 303-866-3855  
TDD 303-866-3472



Dan L. Cartin, Director  
Office of Legislative Legal Services

**Office of Legislative Legal Services**  
200 East Colfax Avenue Suite 091  
Denver, Colorado 80203-1716  
Telephone 303-866-2045  
Facsimile 303-866-4157  
Email: olls.ga@state.co.us

## MEMORANDUM

TO: Jason Legg and Scott Cadiz

FROM: Legislative Council Staff and Office of Legislative Legal Services

DATE: April 10, 2017

SUBJECT: Proposed initiative measure 2017-2018 #31, concerning the criteria for judicial determinations of congressional districts

Section 1-40-105 (1), Colorado Revised Statutes, requires the directors of the Colorado Legislative Council and the Office of Legislative Legal Services to "review and comment" on initiative petitions for proposed laws and amendments to the Colorado constitution. We hereby submit our comments to you regarding the appended proposed initiative.

The purpose of this statutory requirement of the directors of Legislative Council and the Office of Legislative Legal Services is to provide comments intended to aid proponents in determining the language of their proposal and to avail the public of knowledge of the contents of the proposal. Our first objective is to be sure we understand your intent and your objective in proposing the amendment. We hope that the statements and questions contained in this memorandum will provide a basis for discussion and understanding of the proposal.

## Purpose

The major purpose of the proposed amendment to the Colorado Revised Statutes appears to be to create a new factor (i.e., an efficiency gap of less than eight percent) that a court is required to utilize when determining whether a congressional district being established is lawful and in adopting or enforcing any change to such a district.

## **Substantive Comments and Questions**

The substance of the proposed initiative raises the following comments and questions:

1. Article V, section 1 (5.5) of the Colorado constitution requires all proposed initiatives to have a single subject. What is the single subject of the proposed initiative?
2. Under section 1-40-105.5, Colorado Revised Statutes, the Director of Research of the Legislative Council is required to prepare an initial fiscal impact statement, which includes an abstract that appears on petition sections, for each initiative that is submitted to the Title Board. In preparing the statement, the Director is required to consider any fiscal impact estimate prepared by the proponents.
  - a. Will you submit the initiative to the Title Board? If so, when do you intend to do so?
  - b. Are you submitting a fiscal impact estimate today? If not, do you plan to submit an estimate in the future, and if so, when do you intend to do so?
  - c. To ensure that there is time for consideration, you are strongly encouraged to submit your estimate, if any, at least 12 days before the measure is scheduled for a Title Board hearing. The estimate should be submitted to the Legislative Council staff at [BallotImpactEstimates.ga@state.co.us](mailto:BallotImpactEstimates.ga@state.co.us).
  - d. What, if any, fiscal impacts do the proponents anticipate may result if the proposed initiative is adopted?
3. What do the proponents mean by the term "efficiency gap"? This term is undefined in the proposed initiative and in current law, but appears to be a standard for measuring whether, and to what degree, partisan gerrymandering has occurred. Given the relative novelty of the concept, would the proponents consider defining the term in the "Uniform Election Code of 1992"? One accepted definition of this term is that it is the difference between the political parties' respective wasted votes in an election, divided by the total number of votes cast (with a "wasted vote" being any vote cast either for a losing candidate or for the winning candidate above the number of votes needed to win)? Is this what you mean by this term, or do you have a different meaning in mind?
4. How will the efficiency gap be calculated, and by whom? Is there a particular equation or methodology that must be employed? Which election years, which

racess, and which political parties would factor into the calculation? How can a court evaluate or verify the accuracy or statistical soundness of an asserted efficiency gap?

5. How did the proponents arrive at the eight percent figure? Assuming that one of the proponents' objectives with the proposed initiative is to reduce gerrymandering, and in light of that fact that some advocates of using the efficiency gap have asserted that even a seven percent gap is "indicative of uncommonly severe gerrymandering" and "unusually durable" (i.e., a redistricting plan with an efficiency gap of seven percent in favor of one party in the first election year of a plan tends to mean that the efficiency gap will favor that same party in each subsequent election year under that plan), are the proponents concerned that the figure may be too high to achieve their goals?
6. If the efficiency gap for any congressional districts exceeds eight percent, what is the intended result? Does it create a rebuttable presumption of invalidity? How heavily should a court weigh the efficiency gap against the other factors, especially the "permissive" factors in section 2-1-102 (1)(b), C.R.S.?
7. The Colorado Supreme Court has characterized the factors listed under current section 2-1-102 (1)(a), C.R.S., as "constitutional criteria" because they "derive from the U.S. Constitution, they necessarily exist independent of our statute and take precedence over all other considerations". *Hall v. Moreno*, 2012 CO 14, 270 P.3d 961. Because partisan symmetry is not itself constitutionally compelled, would the efficiency gap criterion be more suitably located with the nonexhaustive list of nonconstitutional factors that may be considered by the court under section 2-1-102 (1)(b), C.R.S.?

## Technical Comments

The following comments address technical issues raised by the form of the proposed initiative. These comments will be read aloud at the public meeting only if the proponents so request. You will have the opportunity to ask questions about these comments at the review and comment meeting. Please consider revising the proposed initiative as suggested below.

1. The proposed initiative purports to amend section 1-45-102, C.R.S., but the language included is not contained in that section (which contains the legislative declaration to the "Fair Campaign Practices Act"); rather, it is the language found in section 2-1-102, C.R.S. Is this the section you intended to amend?

2. It is standard drafting practice to use SMALL CAPITAL LETTERS to show language being added and ~~stricken-type~~ to show language being removed from the Colorado constitution or the Colorado Revised Statutes. Existing language and subsection numbering/lettering is written in regular type.
3. It is standard drafting practice to include the introductory portion that precedes a list you are amending. For example, section 2-1-102 (1) and (1)(a), C.R.S., are introductory portions:

**2-1-102. Neutral criteria for judicial determinations of congressional districts.** (1) In determining whether one or more of the congressional districts established in section 2-1-101 are lawful and in adopting or enforcing any change to any such district, courts:

(a) Shall utilize the following factors:

(II) Compliance with the federal "Voting Rights Act of 1965", in particular 42 U.S.C. sec. 1973; ~~and~~

(III) AN EFFICIENCY GAP OF LESS THAN EIGHT PERCENT; AND

4. House Bill 17-1074 amended the introductory portion to section 2-1-102 (1), C.R.S. That bill was signed into law on March 8, 2017, and takes effect in August (unless a referendum petition is filed). The proposed initiative modifies the unamended section 2-1-102 (1), C.R.S. Please consider altering the proposed initiative so that it reflects the updated introductory portion; to wit:

**2-1-102. Neutral criteria for judicial determinations of congressional districts.** (1) In determining whether one or more of the congressional districts established in *accordance with section 44 of article V of the state constitution* are lawful and in adopting or enforcing any change to any such district, courts: (**italicized language indicates the updated text**)